Board of Trustees of the Sarawak Foundation v Bao Timber Sdn Bhd & Ors

HIGH COURT (SIBU) — SUIT NO 22–27 OF 2002
HAMID SULTAN JC
22 JULY 2008

Trade and Industry — Forestry — Licence to take timber — Agreement to transfer or assign licence to first defendant — Reliance on approval from Director of Forests to transfer licence — Whether agreement illegal and contrary to public policy — Forest Ordinance of Sarawak s 2(2)

The plaintiff was a statutory charitable and non-profit making body. Its main source of revenue came from income generated from the forest timber licences (the licences) granted by the Government of Sarawak to the plaintiff. However, the plaintiff was not directly involved in the felling, extraction, harvesting, removing and sale of the merchantable timber under the licences. Instead the plaintiff entered into contracts appointing contractors to fell, extract, harvest, remove and sell the merchantable timber under the respective licences. The monies paid to the plaintiff by the appointed contractors were thereafter credited to the Sarawak Foundation Fund for the purpose of enabling the plaintiff to carry out its charitable and other benevolent objects. On 16 February 1987, the plaintiff entered into an agreement in writing with the first defendant granting the latter the right to fell, extract, harvest, remove and sell the merchantable timber available from the licensed area for an agreed sum. This agreement was approved by the Director of Forests, Sarawak ('Director') in exercise of its powers under s 2(2) of the Sarawak Forest Ordinance ('Ordinance'). By another agreement in writing ('the guarantee') the second, third and fourth defendants agreed to guarantee any sum of monies owing or remaining due and unpaid by the first defendant to the plaintiff together with interest for such late payment. The first defendant breached the agreement when it became indebted to the plaintiff in the sum of RM96,613.60 for the merchantable timber extracted from the licensed area. In addition the first defendant also failed to pay RM50,000, being the annual payment for the years 1987 to 1988, to the plaintiff and a further sum of RM247,544.68, being the royalty bills payable to the Sarawak Government. The first defendant had failed, refused and neglected to pay the outstanding premium, the annual payment and the royalty sum despite the repeated requests and demands for the payment of the same. The second, third and fourth defendants had also failed to pay the amounts due or any

part thereof as per the guarantee. This was the plaintiff's claim to recover such loss of revenue needed to carry out its charitable activity together with interest and costs. The defendant's main line of defence was that the agreement between the first defendant and the plaintiff was illegal because the agreement to assign all the plaintiff's benefits conferred by the licence to the first defendant constituted a device to deceive the forest department in that it was in breach of s 2(2)(a) and (d) and s 51(4) of the Ordinance. Moreover the defendants contended that the agreement breached cl 31 of the licence itself whereby the licence was not transferable. The plaintiff however maintained that although a timber licence was not transferable s 2(2) of the Ordinance expressly confers of the Director to direct the licence holder to enter into an agreement with another. The plaintiff therefore relied on the approval from the director in exercise of its powers under s 2(2) of the Ordinance for the plaintiff to enter into a logging contract with the first defendant.

Held, allowing the claim with costs and interests:

(1) The plaintiff's claim against the defendants had not been substantially challenged by the defendants in the statement of defence or from the documents tendered in evidence. As such there was no material challenge to the demand by the plaintiff (see para 9).

(2) There were no merits in the defendants' argument that the agreement between the first defendant and the plaintiff was illegal and contrary to public policy. In this case the consent for the agreement between the plaintiff and the first defendant had already been properly obtained. In considering the issue of illegality and/or public policy, it is always necessary to consider the facts of the case, the relevant contractual terms, the relevant statutes, the parties, and the object of the agreement etc, before coming to any conclusion. As such the cases relied upon by the defendants could be distinguished from the facts of this case. Furthermore, the plaintiff in this case was inextricably interwoven with the state and also a charitable body incorporated for charitable purposes (see paras 3 & 9).

[Bahasa Malaysia summary

Plaintif adalah badan kebajikan statutori dan tidak berasaskan keuntungan. Punca utama hasilnya datang daripada pendapatan yang dijanakan daripada lesen-lesen pembalakan ('lesen-lesen') yang diberikan oleh Kerajaan Sarawak kepada plaintif. Walau bagaimanapun, plaintif bukan secara terus terlibat di dalam menebang, mengambil, menuai, mengeluarkan dan jualan kayu balak dagangan di bawah lesen-lesen tersebut. Sebaliknya plaintif memasuki

kontrak melantik kontraktor-kontraktor untuk menebang, mengambil, menuai, mengeluarkan dan menjual kayu balak dagangan di bawah lesen-lesen masing-masing. Wang yang dibayar kepada plaintif oleh kontraktor-kontraktor yang dilantik kemudiannya dikreditkan kepada Tabung Penubuhan Sarawak untuk tujuan bagi membolehkan plaintif menjalankan tugas khairatnya dan projek kebajikan yang lain. Pada 16 Februari 1987, plaintif memasuki perjanjian bertulis dengan defendan pertama memberikan kepadanya hak untuk menebang, mengambil, menuai, mengeluarkan dan menjual kayu balak dagangan yang terdapat daripada kawasan lesen untuk jumlah yang dipersetujui. Perjanjian ini diluluskan oleh Pengarah Perhutanan, Sarawak (Pengarah) di dalam menjalankan kuasanya di bawah s 2(2) Ordinan Hutan Sarawak ('Ordinan'). Melalui perjanjian bertulis yang lain ('jaminan') defendan-defendan kedua, ketiga dan keempat bersetuju untuk menjamin apa-apa wang yang terhutang atau kena bayar dan tidak dibayar oleh defendan pertama kepada plaintif bersama dengan faedah untuk pembayaran lambat. Defendan pertama memungkiri perjanjian tersebut apabila ia terhutang kepada plaintif jumlah sebanyak RM96,613.60 untuk kayu balak dagangan yang diambil daripada kawasan lesen. Selanjutnya defendan pertama juga gagal untuk membayar sejumlah RM50,000, sebagai bayaran tahunan untuk tahun-tahun 1987 hingga 1988, kepada plaintif dan jumalah selanjutnya sebanyak RM247,544.68, sebagai bil royalti yang mesti dibayar kepada Kerajaan Sarawak. Defendan pertama telah gagal, engkar dan abai untuk membayar premium belum bayar, bayaran tahunan dan jumlah royalti walaupun diminta beberapa kali dan tuntutan untuk bayaran yang sama. Defendan-defendan kedua, ketiga dan keempat juga telah gagal untuk membayar jumlah yang kena dibayar atau apa-apa bahagiannya seperti jaminan tersebut. Ini adalah tuntutan plaintif untuk mendapatkan kembali kehilangan hasil yang diperlukan untuk meneruskan aktiviti khairatnya bersama dengan faedah dan kos. Pembelaan utama defendan adalah bahawa perjanjian di antara defendan pertama dan plaintif adalah tidak sah kerana perjanjian untuk menyerahhakkan kesemua faedah plaintif yang diberikan oleh lesen kepada defendan pertama membentuk alat untuk menipu jabatan hutan di mana ia memungkiri s 2(2)(a) dan (d) dan s 51(4) Ordinan. Selanjutnya defendan-defendan berhujah bahawa perjanjian tersebut memungkiri klausa 31 lesen itu sendiri di mana lesen tersebut tidak boleh dipindah milik. Plaintif, walau bagaimanapun mengekalkan bahawa walaupun lesen kayu balak tidak boleh dipindah s 2(2) Ordinan secara nyata memberikan kepada Pengarah untuk mengarah pemegang lesen memasuki perjanjian dengan orang lain. Plaintif oleh itu bergantung ke atas kelulusan daripada pengarah di dalam menjalankan kuasanya di bawah s 2(2) Ordinan untuk plaintif memasuki kontrak pembalakan dengan defendan pertama.

Diputuskan, membenarkan tuntutan dengan kos dan faedah:

(1) Tuntutan plaintif terhadap defendan-defendan tidak dicabar

sepenuhnya oleh defendan-defendan di dalam penyataan pembelaan atau dokumen yang diserahkan sebagai keterangan. Oleh itu tidak terdapat cabaran material untuk menuntut oleh plaintif (lihat perenggan 9).

(2) Tidak terdapat merit di dalam hujahan defendan-defendan bahawa perjanjian di antara defendan pertama dan plaintif adalah tidak sah dan bertentangan dengan polisi awam. Dalam kes ini keizinan untuk perjanjian di antara plaintif dan defendan pertama telah diperolehi secara betul. Di dalam mempertimbangkan isu ketidaksahan dan/atau polisi awam, adalah perlu selalu untuk mempertimbangkan fakta kes, terma kontrak yang relevan, statut yang relevan, pihak-pihak, dan objek perjanjian dll, sebelum mencapai apa-apa keputusan. Oleh itu kes-kes yang digunakan oleh defendan-defendan boleh dibezakan daripada fakta kes ini. Selanjutnya, plaintif di dalam kes ini saling berjalin dengan tidak dapat dipisahkan dengan kerajaan dan juga pertubuhan khairat yang ditubuhkan untuk tujuan-tujuan khairat (lihat perenggan 3 & 9).]

Notes

For cases on licence to take timber, see 12 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1861–1864.

Cases referred to

Datuk Yap Pak Leong v Sababumi (Sandakan) Sdn Bhd [1997] 1 MLJ 587, CA (distd)

Hashim bin Adam v Daya Utama Sdn Bhd [1980] 1 MLJ 125, HC (distd)

Lee Eng Teh & Ors v Teh Thiang Seong & Anor [1967] 1 MLJ 42, HC (distd)

Leong Poh Chin v Chin Thin Sin [1959] MLJ 246, HC (distd)

Lo Su Tsoon Timber Deport v Southern Estate Sdn Bhd [1971] 2 MLJ 161, FC (distd)

Minister of Resource Planning & Ors v Keruntum Sdn Bhd [1988] 2 MLJ 226, SC (refd)

Nam Seng Co v Wing Yew (Tawau) Co Sdn Bhd [1978] 2 MLJ 198, FC (distd)

Sababumi (Sandakan) Sdn Bhd v Datuk Yap Pak Leong [1998] 3 MLJ 151, FC (distd)

Sundang Timber Co Sdn Bhd v Kinabatangan Development Co Sdn Bhd [1977] 2 MLJ 200, FC (distd)

Tan Bing Hock v Abu Samah [1967] 2 MLJ 148, HC (distd)

Yap Cheng Kim v Zahid Safian bin Tawaf [1980] 1 MLJ 302, FC (refd)

Legislation referred to

Contracts Act 1950 s 24, 24(a)

Forest Enactment of Sabah ss 23(1)(a), 24(1), 24(6)

Forest Ordinance of Sarawak ss 2(2), 2(2)(b), 2(2)(d), 2(2)(a), 51(4), 51(5)

Pool Betting Act 1967 s 21
Sarawak Foundation Ordinance 1971

Leonard Shim (Reddi & Co Advocates) for the plaintiffs.
Wong Ho Leng (Ho Leng & Co Advocates) for the defendants.

Hamid Sultan JC:

[1] This is my judgment in respect of the plaintiffs' claim against the first, third and fourth defendants for a sum of RM468,421.68 with interest and costs arising from a contract between the plaintiffs and first defendant to fell timber etc pursuant to forest timber licence granted to the plaintiffs under the Forest Ordinance of Sarawak. The second to fourth defendants are guarantors.

[2] At the commencement of the hearing, parties have agreed that the case can be heard by way of: (i) witness statement for examination-in-chief; (ii) preliminary cross-examination witness statement, with full liberty to further cross-examine orally (for purposes of cross-examination); (iii) preliminary re-examination statement with full liberty to further re-examination if there is further oral examination. The court is extremely grateful to the parties for agreeing to such a mode as the preliminary cross-examination witness statement will save much of the court's time to deal with peripheral matters and for all practical purposes, preliminary cross-examination witness statement will stand as interrogatories and answers thereto only, as the right of oral cross-examination to the litigant is preserved during the whole trial.

BRIEF FACTS (THE PLAINTIFFS' VERSION)

[3] The plaintiffs say:

(a) the plaintiffs are a statutory charitable body established by the Sarawak Foundation Ordinance 1971. The objects for which the plaintiffs were established are to, inter alia, grant scholarships or other educational assistance for the people of Sarawak or any Malaysian citizen and to give assistance or provide relief to the poor and needy persons. Being a charitable and non-profit making body, the source of revenue of the plaintiffs come mainly from the income generated from the forest timber licences granted by the Government of Sarawak to the plaintiffs to enable the plaintiffs to carry our their charitable and other benevolent projects.

(b) the plaintiffs were at all material times the lawful holder of forest timber licence No T/0536 ('the licence') issued by the director of forests with the approval of the Minister for Resource Planning pursuant to the Forests Ordinance of Sarawak.

(c) the plaintiffs are also the lawful holder of several other forest timber licences issued by the Director of Forests with the approval of the Minister for Resource Planning pursuant to the Forests Ordinance of Sarawak.

(d) the board of trustees of the Sarawak Foundation (the plaintiffs) comprise of public officers or retired government servants or officers who are appointed by the Yang DiPertua Negeri Sarawak and the government to manage the Sarawak Foundation and to administer and control the Sarawak Foundation Fund.

(e) the plaintiffs are not involved directly in the felling, extraction, harvesting, removing and sale of the merchantable timber under the forest timber licences but has always entered into contracts appointing contractors to fell, extract, harvest, remove and sell the merchantable timber under the respective forest timber licences. The revenue and monies paid by the said appointed contractors to the plaintiffs are credited to the Sarawak Foundation Fund for the purpose of enabling the plaintiffs to carry out its charitable and other benevolent objects.

(f) at all material times, the Director of Forests, Sarawak was aware that the plaintiff is not directly involved in the harvesting and sale of timber and have to appoint contractors to do the same in order to generate revenue for the plaintiffs' charitable and other benevolent projects.

(g) by virtue of the licence, the plaintiffs have the absolute and exclusive rights and privilege to fell, extract, harvest, remove and sell all merchantable timber from all that area situated at Ulu Baoh and Oya-Tamin Stateland, containing an area of 14,396 acres, more or less ('the licensed area').

(h) by an agreement in writing dated 16 day of February 1987 entered into between the plaintiffs of the one part and the first defendant of the other part (hereinafter referred to as 'the principal agreement'), the plaintiffs agreed to grant to the defendants the right to fell, extract, exploit and further sell the merchantable timber available from the licensed area in accordance to the terms and conditions contained therein.

(i) the principal agreement was varied by a supplementary deed of agreement dated the day of May 1992 entered into between the plaintiffs of the one part and the first defendant of the other part

(hereinafter referred to as 'the supplementary deed') (the principal agreement and the supplementary deed are hereinafter referred to as 'the agreement').

(j) the agreement was approved by the Director of Forests, Sarawak in exercise of the power under s 2(2) of the Forest Ordinance (Cap 126) vide a letter from the Director of Forests Sarawak to the plaintiffs dated 14 January 1992.

(k) pursuant to the terms of the agreement, the first defendant agreed to pay to the plaintiffs premium for the timber extracted at the following rates at the end of each month ('the premium'): (i) RM40 per hoppus ton of the total tonnage of ramin extracted; (ii) RM15 per hoppus ton of the total tonnage of alan extracted; (ii) RM20 per hoppus ton of the total tonnage of meranti extracted; (iv) RM15 per hoppus ton of the total tonnage of J\jongkong and Sepetir extracted; and (v) RM10 per hoppus ton of the total tonnage of MLH extracted.

(l) the first defendant has also agreed to pay interest at the rate of 10% per annum at monthly rest on the outstanding premium which remains unpaid 14 days from the due date.

(m) in addition, it is further provided in the agreement that the first defendant was required to make an annual payment of Ringgit Malaysia Twenty Five Thousand (RM25,000) only commencing from 1991.

(n) pursuant to cl 9 of the principal agreement the first defendant agreed to pay for all royalty, premium, tax, duties and other charges in respect of all the timber logs felled and extracted from the licensed area payable to the Sarawak Government and other relevant authorities. By cl 21 of the principal agreement, the first defendant has further agreed to keep the plaintiffs fully indemnified and harmless against all damages, claims, fines, penalties and/or charges resulting from or arising out of any default on the part of the first defendant in carrying out the obligations under the licence as contemplated in the principal agreement.

(o) by an agreement in writing dated the 20 February 1987 made between the plaintiffs and the second, third and fourth defendants ('the guarantee'), the third and fourth defendants agreed to guarantee for the consideration therein set out, the payment on demand of, inter alia, any sum or sums of monies which shall at any time be owing or remain due and unpaid to the plaintiffs from the first defendant together with interest at the rate of ten per cent (10%) per annum by virtue of the agreement.

(p) it is, inter alia, also a term of the guarantee that the second, third and fourth defendants shall pay to the plaintiffs on demand all costs, charges and expenses which the plaintiffs may incur in enforcing or seeking to

obtain payment of all or any part of the moneys owing or remain due and unpaid as guaranteed by the guarantee due to any default by the first defendant.

(q) in breach of cl 4 of the principal agreement as revised by cl 1 of the supplementary deed, the first defendant is truly and justly indebted to the plaintiffs in the sum of Ringgit Malaysia Ninety Six Thousand Six Hundred and Thirteen and Sen Sixty Only (RM96,613.60) as at 30 May 2002 being the balance of the premium due to the plaintiffs for the merchantable timber extracted from the licensed area.

(r) in breach of cl 5 of the supplementary deed, the first defendant has failed to pay the annual payment to the plaintiffs for the years 1997 and 1998 and is therefore further indebted to the plaintiffs in the sum of Ringgit Malaysia Fifty Thousand (RM50,000) only being the outstanding annual payments due for the years 1997 and 1998.

(s) in breach of cl 9, the first defendant failed to settle the royalty bills payable to the Sarawak Government. By a letter dated 3 March 1999, the first defendant proposed to pay the outstanding royalty bills amounting to RM247,544.68 by 34 equal instalments but failed to make any payment.

(t) on or about 6 October 1999, a meeting was held at the plaintiffs' office, 10th Floor Wisma Satok, Jalan Satok, Kuching between the fourth defendant who is the managing director of the first defendant representing the and second defendants and the other directors of the first defendant and the plaintiffs' representatives, Encik Samat Junai and Encik Ahmad Abang. During the said meeting, the plaintiffs' representatives requested and demanded the full settlement of the outstanding premium, royalty and the annual payment as stated in the plaintiffs' letter dated 11 October 1999.

(u) the letter dated 11 October 1999 was written to put in writing the matters discussed at the said meeting and to request and demand payment from the directors of the first defendant for the outstanding premium, royalty and annual payment. The letter dated 11 October 1999 was sent to the first defendant by fax and post. No payment was received from the defendants.

(v) on 1 November 1999, the plaintiffs sent a final reminder by fax and post to the directors of the first defendant to demand payment of the outstanding premium, royalty and annual payment but to no avail.

(w) as a result thereof, the plaintiffs had to pay to the Government of Sarawak an aggregate sum of Ringgit Malaysia Three Hundred Twenty One Thousand Eight Hundred and Eight and Sen Nine (RM321,808.09) only being the outstanding royalty and interest due to

A the Sarawak Government in connection with the timber extracted by the first defendant from the licensed area.

(x) despite demand for the payment of all the aforesaid sums, the first defendant has failed, refused and/or neglected to pay to the plaintiffs the aforesaid sums or at all.

B

(y) by a letter dated the 19 March 2002 issued by the plaintiffs' solicitors on behalf of the plaintiffs to the second, third and forth defendants, the plaintiffs demanded payment of the then amounts due under the agreement by the first defendant. Neither the second, third nor forth

C defendant has paid the amounts due under the agreement by the defendants or any part thereof.

In consequence of the defendants' breach, the plaintiffs suffered loss and damage as set out in para 1(a) hereinabove which had deprived the Sarawak Foundation Fund of revenue needed to carry out its charitable projects.

D

In the circumstances, the plaintiffs are constrained to institute this action against the defendants to recover such loss of revenue together with interest and costs.

It was only after the plaintiffs had instituted this action that the first, third

E and forth defendants raised the issue that the agreement is illegal and contrary to public policy in order to avoid their obligations under the agreement.

The plaintiffs maintain that the agreement is lawful and is not contrary to public policy.

F THE DEFENDANTS' DEFENCE

[4] The first, third and fourth defendants say: (a) that the burden is on the plaintiffs to prove indebtedness and that burden has not been discharged; (b)

G in any event, the first, third and fourth defendants claim that the forest timber licence No T/0536; (c) aver that the licence was and/or had become invalid under s 2(2) of the Forest Ordinance; (d) the agreement was illegal as between the plaintiffs and the first defendant; (e) the agreement constituted a scheme to defraud/deceive the relevant authority and the Government of

H Sarawak, which scheme was illegal and against public policy and cannot be enforced against the first defendant; (f) the agreement contravened the licence conditions and s 51(5) of the Forest Ordinance and were tainted with illegality, was invalid and unenforceable; (g) that the consideration under the agreement was illegal at law which rendered the agreements illegal, invalid,

I unenforceable, null and void; (h) as regards the donation it was based on a gratuitous promise and was/is illegal and/or unenforceable. It was a deceit on

the public administration to make personal gain for the plaintiffs and/or was illegal and/or unenforceable.

PRELIMINARIES

[5] The defendants' main line of defence is anchored on illegality, denial of the sum alleged and the denial of demand. During the course of trial, parties have sorted out the agreed facts and issue to be tried and the defendants have also agreed that all letters of demand have been posted to the defendants.

THE DEFENDANTS' ARGUMENT

[6] On the issue of illegality, the defendants say that: (a) the plaintiffs assigned all the benefits conferred by the licence to the first defendant; (b) assigned all obligations under the licence to the first defendant; (c) these constituted a device to deceive the forest department. In consequence, the defendants' say the agreements are illegal and unenforceable for (a) breaching s 2(2)(a) and (d), s 51(4) of the Forest Ordinance; and (b) breaching cl 31 of the licence and the defendants submit as follows:

> Under the Forest Ordinance, the rights conferred by the licence must be personal. The obligations are concurrent and are also personal. That is why the licence contains an express cl 31 which states:
>
> This licence is not transferable.

[7] The defendants rely on the following cases namely: (i) *Leong Poh Chin v Chin Thin Sin* [1959] MLJ 246, (ii) *Tan Bing Hock v Abu Samah* [1967] 2 MLJ 148, (iii) *Sundang Timber Co Sdn Bhd v Kinabatangan Development Co Sdn Bhd* [1977] 2 MLJ 200 (FC), (iv) *Nam Seng Co v Wing Yew (Tawau) Co Sdn Bhd* [1978] 2 MLJ 198 (FC), (v) *Hashim bin Adam v Daya Utama Sdn Bhd* [1980] 1 MLJ 125, (vi) *Lo Su Tsoon Timber Deport v Southern Estate Sdn Bhd* [1971] 2 MLJ 161 (FC), (vii) *Datuk Yap Pak Leong v Sababumi (Sandakan) Sdn Bhd* [1997] 1 MLJ 587 (CA), (viii) *Sababumi (Sandakan) Sdn Bhd v Datuk Yap Pak Leong* [1998] 3 MLJ 151 (FC), (ix) *Lee Eng Teh & Ors v Teh Thiang Seong & Anor* [1967] 1 MLJ 42.

(a) In *Lo Su Tsuan Timber Depot v Southern Estate Sdn Bhd* [1971] 2 MLJ 161 the Federal Court considered the provision of ss 23 (1)(a) and 24(1) and (6) of the Forest Enactment (Sabah) and held that the agreement was illegal as the respondents in that case transferred their rights in the license to the appellants. The Federal Court opined:

A It is therefore clear from the agreement and the power of attorney that the respondents had assigned all their rights in the licence to the appellants and in so doing had parted with the whole of their interest in the licence. In other words, they had in effect transferred their rights in the licence to the appellants.

B

(b) In *Sundang Timber Co Sdn Bhd v Kinabatangan Development Co Sdn Bhd* [1977] 2 MLJ 200 the appellants were granted a special licence to extract timber in Sabah. The appellants gave the respondents a power of attorney to operate and manage the C appellant's business. All the working capital came from the respondents. The licence provides that the licensee shall not assign the benefits of the licence or assign, transfer any right or privilege thereunder without the previous sanction in writing of the government. The provision of Forest Enactment of Sabah was D considered. The Federal Court observed:

> Just as the financial arrangements for the payment to the licensees is fatal in *Lo Su Tsoon*'s case, so also is such financial arrangement between appellants and respondents fatal to appellants' claim as it is a E part of the consideration for the assignment to respondents of their rights under the special licence. One of the main reasons for the arrangements under the cover of the two documents is to ensure that respondents have complete control of the business aspects of the two companies and that they would be able to recoup their investments plus substantial profits for both parties. Another reason is to deceive F others into believing that respondents were agents when in actual facts all rights' have been assigned to them. In other words respondents had stepped into appellants' shoes by acquiring all the rights under the special licence for all purpose ...
>
> In the case under appeal the agreement and the power of attorney G must be read together as they are interrelated. By these two documents appellants had unreservedly assigned all their rights in the special licence to the respondents. The appellants had nothing more to do with the licence but was merely sitting back to collect his dues as agreed for parting with their rights under the licence. They had parted H with all their interests in the licence for financial consideration. In effect, they had transferred their rights in the licence to the appellants. In my view the agreement is dearly illegal, being in breach of s 24(6) of the Enactment. Consequently, any claim based thereon cannot succeed as it would be tainted with illegality. The power of attorney is necessary if the respondents were to deal with others in such timber I business, particularly with the forest department. As Ismail Khan CJ remarked in *Lo Su Tsoon*'s case, the power of attorney was merely 'a colourable device to deceive others, particularly the forest department into believing that appellants (in our case respondents) were operating as agents for the licensees'.

(c) In *Nam Seng Co v Wing Yew (Tawau) Co Sdn Bhd* [1978] 2 MLJ 198, the first defendant was the licensee over a timber concession. Three documents were executed between the first defendant and the plaintiffs. They being, power of attorney, timber extraction agreement and timber sale agreement. The Federal Court held that the agreements between the parties therein breached s 24(6) of the Sabah Forests Enactment.

(d) In *Tan Bing Hock v Abu Samah* [1967] 2 MLJ 148, the defendant was the licensee issued under the Forests Rules, Pahang which provides that no license thereunder shall be transferred without prior approval. The defendant entered into an agreement with the plaintiff, whereby the plaintiff was to work and extract timber. The defence was that the agreement was illegal made to deceive the public administration. HRH Raja Azlan Shah J (as HRH then was) opined:

> In my view, the agreement executed by the parties has all the badges of a complete assignment of the rights in the licence to the plaintiff. It allows the plaintiff to work and extract timber logs in the whole of the area; the plaintiffs agrees to pay the deposit and all other dues which are required by government; the plaintiff agrees to construct roads and provide transport and to pay labourer's salaries and their workmen's compensation contributions. The defendant is the licence-holder to make arrangements with government concerning the forest area, and the plaintiff agrees to compensate him for all expenses incurred thereby. The most important clause in the agreement provides for the payment of $2,000 as a lump sum or total payment in consideration for the logs extracted and sold by the plaintiff. The calculation of tons is not agreed upon, and lastly the arrangement of sale of timber logs belongs to the plaintiff. In short, the licence-holder, namely the defendant, merely sits still and gets a lump sum payment of $2,000 while the plaintiff works the area and fulfils all the obligations that are required under the Forest Enactment. To my mind, it possesses the notorious badge of the 'Ali Baba' form of contract.
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> In my judgment the agreement is null and void and illegal as tending to contravene the provisions of rr 2 and 18 of the Forest Rules 1935 ...

(e) In *Hashim bin Adam v Daya Utama Sdn Bhd* [1980] 1 MLJ 125, the plaintiff was the licensee granted under the Forest Rules Terengganu. He transferred the licence to the defendants to fell and remove timber. The defendants were to pay the plaintiff $4 for each ton of timber felled and removed by way of tribute. The defendants were to work on the area, enjoy the benefits there from, be responsible for those obligations as agreed. The plaintiffs' obligation was merely to seek the extension of time of the licence.

The plaintiff sued the defendants for outstanding premium and tribute accrued. The court opined:

> If we consider the agreement entered between the parties herein it is obvious that for all intents and purposes a transfer of a substantial right obtainable under the licence from the plaintiff to the defendant was made under the agreement ...
>
> Further, if you transfer a licence, you transfer certain rights that go along with it. That being the case, r 2 must be construed that the transfer of the licence would include the rights thereunder ...
>
> What is then prohibited by the law from being transferred? I am of the opinion the intention of the Legislature was to prohibit transfers by way of agreements of the rights under a licence, as the rights must necessarily go with the licence.
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> My opinion is strengthened by the conditions of the rules. Rule 2 itself stipulates that no person shall operate logging operation without a licence. The defendant having no such licence cannot therefore operate the logging operation. ... The law will not allow a person to extract timber on a contract with a licensed holder ...
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> Here in the instant case the defendants are not the workmen of the plaintiff. They obtained rights not as an employment contract but as a result of consideration paid to the plaintiff for the rights under the licence. They are their own employers ...
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> As such I am of the opinion the agreement executed between the patties here is in effect a purported transfer of the licence which is prohibited by the rules and as such I hold it to be null and void as contravening s 24 of the Contracts Act 1950.

(f) In *Sababumi (Sandakan) Sdn Bhd v Datuk Yap Pak Leong* [1998] 3 MLJ 151, the Sandakan Turf Club was granted a licence to operate 3-digit and 4-digit lotteries. On 26 November 1987, a written agreement ('the agreement') was concluded between the club and the appellant. Under the agreement, the appellant was to buy 100 acres of land and to construct a racecourse on the land at its own expense. The club in turn agreed to sublease the land and the racecourse to the appellant for a period of 20 years. The appellant was given the exclusive rights to conduct and manage all betting on the races at the racecourse and to conduct and manage all 3-d and 4-d operators throughout the State of Sabah. The appellant was to pay 2% of its gross sale takings to the club on a joint venture basis. the licence contains a condition which reads: 'This licence shall be personal to the licensee and shall not be transferable in any manner

whatsoever.' The Federal Court was unanimous in dismissing the appeal and declared the agreement illegal and unenforceable under s 24(a) of the Contracts Act 1950. The court said that the illegal or prohibited act was the breach of the licence, which prohibited the assignment of rights. the agreement assigned wholly or partly the rights of the club granted by the federal licence, by granting the appellant the exclusive right to conduct the betting. As such, the agreement amounted to a contract to do an act forbidden or prohibited by s 21 of the Pool Betting Act 1967. This contradicted s 24(a) of the Contracts Act 1950 and the agreement was therefore illegal and void. His Lordship Peh Swee Chin FCJ opined:

> It has been submitted that the breach of condition 23 has occurred because the said agreement purportedly assigned wholly or partly the rights of the said turf club granted by the federal licence. It will be remembered that the said operator was granted the exclusive right to conduct the off-course and on-course betting by the said operator authorised under the said federal licence which was granted to the said turf club. It would be quite impossible to say that the obtaining of such exclusive right to operate the off-course and on-course betting is not an assignment wholly or partly of such rights granted to the said turf club by the said federal licence. On what amounts to assignment of the rights of a licence, the number of authorities is legion, and just to name two cases in the Federal Court, see *Sundang Timber Co Sdn Bhd v Kinabatangan Development Co Sdn Bhd* [1977] 2 MLJ 200 and *Lo Su Tsoon Timber Depot v Southern Estate Sdn Bhd* [1971] 2 MLJ 161.

(g) In *Datuk Yap Pak Leong v Sababumi (Sandakan) Sdn Bhd* [1997] 1 MLJ 587 the Court of Appeal observed:

> It cannot be gainsaid that the club, by the terms of the agreement, assigned to the respondent all the rights and benefits conferred by the original licence. Mr Anatham had summarised the effect of that agreement when he addressed us upon the first issue. We have referred to it earlier in this judgment. The respondent was to do everything the club could do by virtue of the original licence. In return, the club was to receive 2% of the gross takings.
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> We are of the view that the position here is akin to that which obtained in *Tan Bing Hock v Abu Samah* [1967] 2 MLJ 148, a case involving an agreement to extract timber from a forest concession. Of the result produced by the agreement in that case, Raja Azlan Shah (as he then was) said:
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> > In short, the licence-holder, namely the defendant, merely sits still and gets a lump sum payment of RM2,000 while the plaintiff works

A the area and fulfils all the obligations that are required under the Forest Enactment.

Much the same may be said of the agreement in the present case. True it is that in *Tan Bing Hock* the defendant received a lump sum payment; while in the present case, the club was to receive an amount that would vary from time to time according to the quantum of the gross takings earned by the respondent. But this is a distinction without difference ...

We will assume for a moment that we are wrong in our conclusion that the Act impliedly prohibits the assignment or transfer of a licence. Even upon the view that the Act is silent upon the matter, the agreement is nevertheless illegal and void because it violates the terms of the new licence. In our judgment, it does not matter that the prohibition against transfer or assignment appears as a condition in the new licence and not in the Act. The same view, albeit in a somewhat different context, was expressed by the (then) Supreme Court in *Minister of Resource Planning & Ors v Keruntum Sdn Bhd* [1988] 2 MLJ 226. Having regard to the scheme and policy of the Act, it does not matter whether the prohibition against assignment is contained in the Act or merely in the licence. The result is the same.

E (h) In *Lee Eng Teh & Ors v Teh Thiang Seong & Anor* [1967] 1 MLJ 42, the court said:

… The case against the first defendant is that he made a promise to donate 30 acres of land for the building of a school. It is contended that promise can be taken to mean that either the first defendant had contracted to transfer 30 acres of land to trustees for the building of a school or to declare himself a trustee for that purpose. The question however, is whether a mere gratuitous promise to subscribe to the charity has any legal consequences. A short answer to that is that such a promise cannot be sued upon. This is clear from the case of *Re Hudson* (1885) 54 LJ Ch 811 in which there was a promise to give £20,000 in five equal instalments to a jubilee fund. After paying three instalments the promisor died. It was held that the two remaining instalments could not be recovered against his estate. Similarly, in *Re Cory* (1912) 29 TLT 18 at the death of the testator certain promises by him of donation to various institutions remained unredeemed. It was held that these promises created no contractual obligations between the parties and therefore there was no legal debt due from the testator's estate to the institutions. It is to be observed that in this latter case the promise of donations was made to some existing charitable institutions. In the present case there was a promise to donate to a proposed charitable I fund. Thus it is abundantly dear that the first defendant incurred no

contractual liability by making a promise to donate 30 acres of/and for the building of a school.

And in reliance of s 24 of the CA 1950 and the Forest Ordinance Sarawak and case laws the defendants say the agreements are illegal and therefore unenforceable.

THE PLAINTIFFS' ARGUMENT

[8] The plaintiffs maintain that the agreement is lawful and is not contrary to public policy. And says:

(a) although a timber license is declared to be not transferable, s 2(2)(d) of the Forests Ordinance expressly confers the power on the Director of Forests to direct that the holder of the timber licence be allowed to enter into an agreement with another person, the effect of which is to enable the benefits conferred by the licence to be enjoyed by any other person; (b) in the present case, it is an undisputed fact that the Director of Forests had by a letter dated 14 January 1992 approved the plaintiffs' application to enter into a logging contract with the first defendant based on the submitted logging contract in exercise of the power conferred on the Director of Forests under s 2(2)(d) of the Forest Ordinance.

And relies on the following cases and says:

(i) In *Yap Cheng Kim v Zahid Safian bin Tawaf* [1980] 1 MLJ 302, the respondent and Yayasan Trengganu held a forest permit over part of a forest reserve. By an agreement with the Yayasan Terengganu, the respondents undertook to fell, extract and haul timber in the area. The forest permit and the agreement with Yayasan Terengganu contained similar conditions, that is, assignment, transfer or subletting was subject to written approval of the state forest officer and of the Yayasan. The appellant agreed to accept assignment from the respondent. Although no prior written approval from the state forest officer for the assignment was obtained there was evidence adduced to show that the state forest officer would have approved of the assignment. The Federal Court held:

(1) In the circumstances of this case as approval could have been obtained from the state forest officer, the contract of assignment would have been legal;

(ii) In *Minister of Resource Planning & Ors v Keruntum Sdn Bhd* [1988] 2 MLJ 226, the timber licence issued to the respondent under the Forests Ordinance (Sarawak) was declared to be non-transferable. After the issue of the license, the controlling shares of the respondents were transferred without obtaining the direction and/or approval of the

Director of Forests as required under s 2(2)(b) of the Forests Ordinance. Although there was a contravention of s 2(2)(b) of the Forests Ordinance by the respondent, the Supreme Court found that the timber licence did not become automatically extinguished or invalid the moment the transfer of the controlling shares or other paragraphs of sub-s (2) of s 2 of the Ordinance took place. The Supreme Court held:

(2) the expression 'declared to be non-transferable' in s 2(2) of the Forest Ordinance does not restrict the operation of the section to licences issued under s 51 only; it extends to licences issued under s 55 also. Section 2(2) of the Ordinance applies to licences issued under s 55 in the same way as it does to licences issued under s 51;

(3) the licence did not become automatically extinguished or invalid the moment the transfer of the controlling shares or other paras of sub-s (2) of s 2 of the Ordinance took place. The phrase 'unless the director or a person authorised by him in that behalf otherwise directs' is clearly intended by the legislature to mean that a licence does not become automatically invalid;

(4) the proper procedure which should be accepted by the director is that as soon as he becomes aware of the happening of any of the events enumerated in paras (a), (b), (c) and (d) of s 2(2) of the Ordinance, he has to make up his mind whether to treat the licence as invalid or to treat it as still continuing. But before making any such decision one way or the other the principle of fairness and prudent administration requires him to inform the licensee that his licence would be cancelled unless he can show an acceptable reason why it should not be regarded as invalid and therefore cancelled;

(5) there is therefore no question of the licence becoming automatically invalid and, as the respondent was deprived of an opportunity to explain the invalidating event and to discharge the burden which would entitle him to a contrary decision of the director, the appeal is dismissed with costs.

(1) For the purposes of enabling the foundation to carry out its objects, there shall be established a fund to be called the Sarawak Foundation Fund.

(2) The fund shall consist of:

(a) such sums as the government may from time to time contribute to the fund;

(b) all other monies which may be donated, contributed, loaned or in any other manner paid into the fund by any authority or persons.

[9] I have heard the evidence, read the pleadings, documents and submissions of parties in detail. I take the view the plaintiffs'claim must be allowed. My reasons are as follows:

(a) The plaintiffs' claim as to the sum due and owing has not been substantially challenged by the defendants in the statement of defence, or evidence or from the documents. Further, there was also no material challenge to the demand by the plaintiffs.

(b) The defendants' argument on illegality and against public policy has no merits. In this case, proper approval and consent for the agreement between the plaintiffs and the defendants have been properly obtained. Furthermore, the plaintiffs in this case is inextricably interwoven with the state and is also a charitable body incorporated for charitable purpose. The cases which the defendants had relied on can be distinguished from the facts of this case. In considering the issue of illegality and/or public policy grounds, the court will always have to consider the facts of the case, the relevant contractual terms, the relevant statutes, the parties, the object of the agreement etc before coming to any conclusion. It cannot be based on purely case laws unless the facts and/or, all issues are the same.

[10] For reasons stated above, I allow the plaintiffs' claim as prayed with costs and interests. The getting up fees shall not exceed RM50,000. If costs cannot be agreed, the plaintiffs are at liberty to tax the costs. In consequence, I make the following orders:

The first, third and fourth defendants to pay the plaintiff:

(a) a sum of RM96,613.59 with interest at 10% per annum from 1 January 1998 until the date of judgment and thereafter at 8% per annum from date of judgment until date of realisation.

(b) RM50,000 with interests at 8% per annum from 30 June 2002 until date of judgment and thereafter at 8% per annum from the date of judgment until the date of realisation.

(c) RM321,808.09 with interest at 8% per annum from 30 June 2002 until date of judgment and thereafter at 8% per annum until date of realisation.

A (d) Costs as stated above.

I hereby order so.

Claim allowed with costs and interests.

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Reported by K Nesan

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